83-112

No....
IN THE

Supreme Court of the United States

October Term, 1982

JOHN B HOLWAY, Petitioner,

vs

PERCY THORNTON
SELWYN SMITH
ALBERT BRYAN JR
MARK P. FRIEDLANDER
CLIFFORD SHOEMAKER
WILLIAM HAMBLEN
HELEN FAHEY
RONALD TYDINGS

Respondants

PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. FOURTH COURT OF APPEALS

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Questions Presented

1. Whether an attorney who conspires with a judge to commit fraud is protected by judicial immunity?

2. Whether the statute of limitations in a suit alleging continuing violations of civil rights is two years or five years?

3. Whether the executive branch's defense of members of the judicial branch charged with serious torts and constitutional abuses can be reconciled with the constitutional principle of separation of powers and checks and balances?

4. Whether "due process" and "equal protection" of the laws is upheld when a case is heard by a close colleague and friend of a defendant, then reviewed and dismissed by an appeals court headed by the father of the defendant? Whether such action "knowingly and deliberately" violates constitutional rights?

5. Whether a judge who knowingly admits a fraudulent citation without permitting the other side to see it is performing an act "normally per-

formed by a judge"? Whether such action "knowingly and deliberately violates a constitutional right?

6. Whether fraud by an attorney and judge violates petitioner's constitutional right to due process and equal protection of the law?

7. Whether a judge—a colleague of the first judge—who refuses in a related suit to permit a defendant to mount any defense in court in order to hush up testimony of the fraud, is performing an act "normally performed by a judge"? Whether such action "knowingly and deliberately violates a constitutional right?

8. Whether a judge who presides at a hearing on fraud and refuses to permit testimony of the fraud, thus covering it up and protecting the perpetrators, is performing an act "normally performed by a judge"? Whether such action "knowingly and deliberately violates a constitutional right?

9. Whether commonwealth attorneys who knowingly make untrue statements that fraud by judges and attorneys in court is not criminal under the law, are performing acts "normally performed" by prosecutors?

10. Whether the privilege of judicial and prosecutorial immunity is sanctioned by Act of the United States Congress, or whether it is in violation of the wishes of Congress as expressed in the Ku Klux Klan Act of 1871, sections 1983 and 1985 and the 42nd US Code?

11. Whether the privilege of judicial immunity is sanctioned by the U.S. Constitution, or whether it is in violation of rights guaranteed to all citizens by the Fifth, Seventh, and Fourteenth Amendments to the Constitution?

12. Whether the U. S. Constitution is the supreme law of the United States, or whether English common law—specifically the 17th Century doctrine of Divine Right of Kings and its corollaries—takes precedence over the Constitution?

13. Whether a non-constitutional privilege takes precedence over a constitutionally guaranteed right?

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Petitioner John B Holway respectively prays that a Writ of Certiorari issue to review the judgment and opinion of the Eastern district of Virginia entered in this proceeding on September 15 1982.

OPINIONS BELOW

The ruling of the Eastern District of Virginia Court is reproduced as Appendix A hereto. The

order of the Fourth Circuit Court of Appeals is reproduced as Appendix B.

JURISDICTION

The ruling of the Fourth Circuit Court was entered on September 15 1982. This Petition for Certiorari was filed within 90 days of that date. The Court's jurisdiction was invoked under Section 28 USC section 1254 (1) and Section 1257 (3), and 28 USC Section 1332 (a)(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Sonstitution
Article Six (in relevant part):

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Fifth Amendment (in relevant part):

"No person shall be... deprived of life, liberty or property, without due process of law."

Seventh Amendment (in relevant part):

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

Fourteenth Amendment (in relevant part):

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Virginia Constitution Bill of Rights, Section I:

> 1. Equality and rights of men. All men are by nature equally free and independent, and have certain inherent rights...
>
> 4. No exclusive emoluments or privileges. No man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community... neither ought the offices of magistrate, legislator, or judge to be hereditary."

Section II:

"All authorities agree that due process of law requires tha a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be passed affecting his rights in liberty or property."

STATEMENT OF THE CASE

The facts of the case are as follows:

The case had its origin when the petitioner, Holway, sold a movie theatre to one Robert Tucker, receiving a lien on the theatre equipment as security for a note from Tucker. When Tucker defaulted, Holway exercised his lien. The theater landlord, Jonathan England, represented by his attorneys, defendants Friedlander and Shoemaker, sought to stop foreclosure, arguing to Judge Thornton, also a defendant, that Tucker had "surrendered" the equipment to England and that this "surrender" obviated Holway's lien. Friedlander and Shoemaker cited a Virginia Supreme Court precedent, Mullins v Sturgill, in support of their argument. They showed it to Thornton. Holway asked to see it but was not permitted to. Thornton then ruled in favor of England. When Holway asked what law he was citing, Thornton replied vaguely, "the law up here in my head." On inspection later, Holway discovered that Mullins v Sturgill was fraudulently misquoted and actually

upheld Holway's position as lienholder. His appeal was turned down without comment but presumably on the grounds that Thornton's error was not pointed out to him at the time it was made.

Holway complained about the fraud to the Virginia Judicial Inquiry and Review commission. He was told that the matter was not "within its purview." He complained to the Virginia Bar but was told by Tydings, a defendant, that such conduct is not illegal under Virginia law. He complained to two commonwealth attorneys, Hamblen and Fahey, also defendants, and was likewise told that the conduct is not criminal in Virginia, although Virginia law clearly says that fraud is indeed a crime.

Holway next took the matter of fraud to Selwyn Smith, a judge in Thornton's court and a defendant in the present case, and called for an investigation as required by Virginia law. Smith refused to investigate.

In a related but separate matter, Holway was defendant in a motion heard by Judge Smith. Holway told Smith that Friedlander had again deliberately lied in his opening statement and promised to detail the lies in the defense. Smith then ruled that Holway could not mount a defense, he angrily warned Holway that "there is plenty of room in the jails" for Holway if he persisted in discussing integrity of lawyers in court, and summarily ruled in favor of Friedlander's client, without hearing Holway's case at all.

Holway brought an action for fraud in US District court (Eastern District of Virginia) against England. But Judge Albert Bryan Jr, another defendant, refused to permit evidence of the fraudulent behavior of the attorneys and Judge Thornton. He then granted Friedlander's motion to dismiss for lack of evidence! He said he would not go behind Thornton's ruling, even if it was wrong.

REASONS FOR GRANTING THE REVIEW

AN ATTORNEY WHO CONSPIRES WITH A JUDGE TO COMMIT FRAUD IS NOT PROTECTED BY THE IMMUNITY CLAIMED BY THE JUDGE.

As the Court ruled in Gomez v Toledo, (446 US 635, 1980), two, and only two, allegations are required for a cause of action under 1983:

1) the plaintiff must allege that some person has deprived him of a federal right, and

2) he must allege that the person acted under color of state law.

In Dennis v Sparks (449 US 24, 1980) this Court ruled:

> The action against the private parties accused of conspiring with the judge is not subject to dismissal. Private persons, jointly engaged with state officials in a challenged action, are acting 'under color' of law for purposes of section 1983....
>
> Historically at common law, judicial immunity does not insulate from damages liability those private persons who corruptly conspire with a judge.

Friedlander and Shoemaker could not have succeeded in their lie without the active agreement of Thornton, who read the correct citation and knew its contents but refused to let Holway read it. The lie probably would not even have been attempted without prior assurance of Thornton's acquiescence.

Friedlander and Shoemaker are not being sued because they went to court.

They are not being sued because they won in court.

They are being sued because they lied in in court.

Second, it is not necessary to prove bribery of a judge. Nowhere does Dennis say that bribery is the only circumstance in which a state official's actions are applicable to a section 198

Of course, the possible bribery of Thornton is the large, unspoken issue hanging over this matter. I do not know whether Thornton was bribed or not. But there are only two possibilities.

Either he was paid,or he did what he did for free.

I cannot say what Thornton's motives may have been. But I can say — and I do say — what his actions were. Those actions alone are sufficient to establish a section 1983 action.

THE STATUTE OF LIMITATIONS IN A CIVIL RIGHTS SUIT INVOLVING PROPERTY RIGHTS OR CONTINUOUS DISCRIMINATION IS FIVE YEARS.

Thornton, Smith, and Tydings argue that federal courts must apply the local two-year statute of limitations. However, the 1950 Code of Virginia, section 8.01-243 (D), clearly prescribes a five-year limitation on civil right injuries involving property or business.

The five-year limit was applied by the federal court in the Western District of Virginia in Eden Corp v Utica Mut Ins Co (350 F.Sup 637, 1975) and in Almond v Kent (321 F.Sup 1225, 1970). The Eastern District of Virginia, defendant Bryan's own court, also applied the five-year limit, that is, until Bryan himself appeared as a defendant in that Court. Judge Merhige applied the five-year

limit in Federated Graphics v Napotnik (424 F.Sup 291, 1976) and in Chesapeake Bay Foundations v Va Water Control Board (501 F.Sup 821, 1980). Judge Clarke of that court similarly applied the five-year limit in Moore v Allied Chem Co (480 F.Supp 364, 1980).

In addition, 42 USCA section 1981 provides a five-year limit in the case of continuous discrimination, such as alleged in the present suit. Judge Clarke of the Eastern District of Virginia recognized this limit in White v City of Suffolk (460 F.Supp 516, 1978).

It is apparent that the Eastern District of Virginia has one standard when one of its own judges is a defendant accused of breaking the law, and quite another standard for everyone else. This is an obvious violation of the 14th amendment guarantee of equal protection of the laws.

THE PRACTICE OF THE EXECUTIVE BRANCH DEFENDING JUDGES ACCUSED OF SERIOUS LAW VIOLATIONS AND CONSTITUTIONAL ABUSES VIOLATES THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS. IT PROVIDES THE DEFENDANTS WITH UNCONSTITUTIONAL, ILLEGAL, AND UNDEMOCRATIC PROTECTION FOR THEIR WRONGDOING, AND ROBS THE PUBLIC OF ITS RIGHT TO HAVE SUCH WRONGDOING PROSECUTED, NOT DEFENDED.

The French philosopher Montesquieu said, "There can be no liberty...if the power of judging be not separated from the legislative and executive powers."

The Framers of the Constituion, both of Virginia and of the United States, spoke eloquently of the dangers to individual rights if two or more branches are allowed to unite in an effort to abuse those rights.

The Virginia Bill of Rights, Article I of the Virginia Constitution, section 5, says "the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct.

James Madison emphatically agreed, writing in The Federalist #47 that

> Were the power of judging joined with the executive power, the judge might behave with all the violence of an oppressor (Emphasis in original).

Alexander Hamilton, in Federalist #78, wrote

> I agree that there is no liberty, if the power of judging be not separated from the legislative and executive powers.

As the US Supreme Court ruled in Butz v Economou (511 US at 478):

> Unlike a judge, officials of the Executive Branch would face no conflict of interest if their legal representation were provided by the Executive Branch (emphasis added).

The District of Columbia and six states—Pennsylvania, Texas, Kansas, South Dakota, Montana, and Hawaii--recognize this conflict of interest and do not permit their Attorneys General to represent judges accused of wrongdoing.

Furthermore, the three judge defendants are accused, and have admitted, behavior, which is also criminal under 18 US Code section 242 and section 18.02 of the Code of Virginia. As members of the law enforcement departments, Mssrs Merrill and Berger, defense attorneys in the present case, have the responsibility of prosecuting lawbreakers. By rushing to their defense, and even excusing it, they have foreclosed any chance

that the defendant judges can ever be given an impartial investigation or brought to justice for their acts.

The Attorney General of the United States, thus has Bryan's own admission that Bryan committed a crime punishable by federal criminal statute. Why does not the Attorney General prosecute Bryan for his admitted criminal misconduct? If the Attorney General will not prosecute an admitted violator of criminal law, who will?

It is not lost on the public that the Attorneys General are beneficiaries of the judge-given privilege of prosecutorial immunity. Thus they have a personal stake in defending the principle of immunity, since their own is so closely wrapped up in that of their clients.

WHEN A CLOSE COLLEAGUE AND FRIEND OF A JUDGE DEFENDANT HEARS THE DEFENDANT'S CASE, AND WHEN THE CASE IS REVIEWED BY AN APPEALS COURT HEADED BY THE DEFENDANT'S FATHER, SUCH OBVIOUSLY BIASED PROCEDURE VIOLATES THE "EQUAL PROTECTION" CLAUSE OF THE FOURTEENTH AMENDMENT.

Defendant Albert Bryan Junior sits on the federal court of the Eastern District of Virgina. The case was heard by Richard Williams, a close colleague of the defendant. Williams remarked in another case that same morning that he is a junior member of the court and is very sensitive to having his rulings overturned by the Fourth Circuit Court of Appeals, a court headed by Bryan Junior's father.

The case was appealed to Bryan's father's court, the Fourth Circuit. Although the senior Bryan did not (as far as is known) take an active part in the case involving his son, the distinction is academic. This bit of nepotism is unseemly and raises grave questions about propriety and bias. Every one of Bryan's fellow defendants said they preferred the case to be reviewed by Bryan's father's court and not by a neutral court. Bryan Junior himself apparently saw nothing improper in his father's court reviewing his case.

THE JUDGE AND PROSECUTOR DEFENDANTS IN THE PRESENT CASE HAVE FAILED TO MEET THE SUPREME COURT'S OWN TEST FOR JUDICIAL IMMUNITY: THEIR ACTIONS ARE NOT APPEALABLE; THEY ARE NOT ACTIONS "NORMALLY PERFORMED BY A JUDGE," AND THEY "KNOWINGLY AND DELIBERATELY VIOLATE CONSTITUTIONAL RIGHTS."

The Supreme Court ruled in Stump v Sparkman (435 US 349, 1978) that it is the nature of the act, not the title of the actor, that determines immunity.

When a judge "acts in a manner that precludes all resort to appellate or other judicial remedies ...he is entitled to no judicial immunity," Justice Powell wrote.

Judge Thornton, by engaging in fraud and preventing me from seeing the true nature of Mullins v Sturgill, made sure that no appeal could succeed. The Virginia Supreme Court has a rule, which it scrupulously adheres to, that no appeal can be successful unless the judge's error is pointed out to him at the time he makes it. Of course, Thornton made sure that I would not discover the fraud in time to point it out.

Smith also availed himself of the same Virginia supreme court rule when he summarily banged his gavel down as I began my defense in his court and refused to let me say another word. Under such circumstances, of course, it was impossible to point out his error, and therefore a successful appeal.

When Smith refused even to investigate a charge of fraud, as he is required to under Virginia law, he left the citizen with nowhere to go for satisfaction.

But the main test of a "judicial" act, the Stump Court said, is "whether it is a function normally performed by a judge."

In Rankin v Howard (633 F.2d 844, 1980) a federal court ruled that a judge's private prior agreement to decide in favor of one party is not a "judicial act" for purposes of judicial immunity.

> Conniving with a party to predetermine the outcome of a judicial proceeding is not a function normally performed by a judge and frustrates the other party's expectation of judicial impartiality.... If his acts were part of a conspiracy, he would be held properly liable under this section (1983) for consequences thereof.

None of the five defendants who claim immunity have claimed that their actions meet the Stump test. They have not even offered evidence that their actions are normally performed by judges or prosecutors.

This Court has laid down a further criterion for judicial immunity, one which goes to the heart of the present case.

When Secretary of Agriculture Butz asked for judicial immunity, saying his ruling against a trading company was a judicial act, the Supreme Court rejected his argument, saying he had gone "manifestly beyond the line of duty" and "exceeded constitutional limits." It said absolute immunity for officials "who knowingly and deliberately violate constitutional rights is contrary to the course of decisions in this Court from the very early days of the republic. It added that there are "well established and unambiguous constitutional limitations on powers," and officials "may not with impunity ignore them" (Butz,(supra).

> This Court has never purported to grant immunity of any kind to any official who has manifestly overreached his authority or wrongfully exceeded clear constitutional or statutory boundaries. Official immunity is utterly unavailable when a government figure has wandered completely off the official reservation" (id. 519).

The special case of Selwyn Smith merits separate consideration. As far as is known, he is the only judge in the entire history of American jurisprudence, in any one of the 50 states, for over 200 years, who has ever refused to permit a defendant to defend himself in court.

Wrote Chief Justice Earl Warren: The minimum requirements of due process include "the opportunity to be heard in person and to present witnesses and documentary evidence." (Morrissey v Brewer, 408 US 471, 1972).

In Mack v Johnson (430 F. Supp 1139, 1977), a prisoner charged that a prison disciplinary proceeding had failed to let him give his side of the story before ordering punishment. The federal court agreed that "frustration of his attempts to give his side of the story violated inmate's

constitutional rights" and ruled that the board could be assessed punitive damages.

In Thompson v Burke (556 F2d 231, 1977), the court ruled that a parole board's action in revoking a parole without a hearing was "not adjudicatory."

Irene Merker Rosenberg writes in the Virginia Law Review (vol 64, p 849, 1978):

> When a judge structures a controversy such that one side is necessarily precluded from presenting any evidence concerning the decision to be made, the court's actions properly can be viewed as jurisdictional error rather than a mere error in the exercise of power.

She adds that when constitutional errors are of such a magnitude as to deprive the proceeding of the indicia of fundamental fairness, the Supreme Court has declared the tribunal lacked "jurisdiction" and that its actions are subject to attack (see Blackledge v Perry, 417 US 21, 1974; and Frank v Mangum, 237 US 309, 1915).

As the Yale Law Journal (vol 79, 1969) wrote:

> A citizen can legitimately expect an officer of the law to act only with due respect to individual rights; if he deliberately does not respect those rights and causes injury, he is not acting within the protection of his commission (p 332).

To rule that school boards, parole boards, and Cabinet officers are not performing valid judicial acts when they abuse constitutional rights, but that judges are allowed with impunity to perform the very same acts, would invalidate the Supreme Court's own doctrine in Stump that it is the nature of the act, not the character of the actor, that determines immunity.

JUDICIAL IMMUNITY IS A PRIVILEGE NOT GRANTED BY THE U.S. CONGRESS. IN FACT, IT IS IN DIRECT AND OBVIOUS VIOLATION OF AN ACT OF CONGRESS, THE KU KLUX KLAN ACT OF 1871.

In 1866 the Congress passed a Civil Rights Act specifically imposing criminal penalties on judges and others who violate the civil rights of citizens (18 USC 242). Both the House and Senate debates confirm that the criminal nature of the penalties extended to state judges. (Statements by Rep Shellabarger, Cong. Globe, 39th Cong., 1st

session 475-6; colloquy by Reps Thayer and Eldridge, id, 1154-5).

At least two amendments were introduced to delete criminal liability for judges. Both were defeated. (Id, 1156, 1266). President Andrew Johnson vetoed the Act, in part because it applied to both judges and state legislators. (Id, 1679-81) The Act's Senate sponsor, Sen Trumbull, replied that it would not apply to legislators but would apply to judges. (Id 1755-61) The veto was overridden in both houses.

In 1868 Congress passed the 14th Amendment to the Constitution reiterating that the rights of citizens cannot be abridged by any group.

In 1870 Congress passed another Civil Rights Act, (present 42 USC 1981), which gives all Americans the same rights to sue and the same punishments and penalties.

The law was enacted "primarily, if not exclusively, to control the behavior of state court judges." (Kates, Don B Jr, "Immunity of State

Judges," 65 Northwestern University Law Review 621, 1970).

A year later, in 1871, Congress was locked in heated debate over the Ku Klux Klan Act, since known as the Civil Rights Act of 1871 (now section 1983, 42nd US Code). The constitutional rights of blacks in the South were being effectively negated by, among others, judges, who refused to enforce the new 14th Amendment.

Every speaker in the debate, both for and against the bill, agreed that it was aimed specifically at judges, as well as other state offials.

Senator Thurman: "There have been two or three instances already under the (earlier) civil rights bill of state judges being taken into US District Court, sometimes under indictment for offense. Is (this) intended to perpetuate that? That is the language of the bill." The supporters replied affirmat

Congressman Rainey of South Carolina declared that "the courts are in many instances under the control of those who are wholly inimical to the administration of justice.

Congressman Beatty of Ohio: "It is the duty of Congress to listen to the appeals of those who "by reason of...bribed judges cannot obtain the rights and privileges due an American citizen."

Senator Osborn: "Justice is mocked, innocence punished, perjury rewarded, and crime defiant in the hall of justice." (Cong Globe, 42nd Cong, 1st sess., 653).

Rep Platt: Judges have become "little Kings, with almost despotic powers" (id 186 app).

After all the debate was over, both Houses approved the bill. President Andrew Johnson vetoed it, because of its effect upon the judges, but the House and Senate came right back and overrode his veto again. The intent of Congress could not have been more clear.

Congress' philosophy has not changed. As recently as September 12, 1982, Senator Howard Metzenbaum re-stated it in the Washington Post (p. B5):

It is unwise and contrary to our basic democratic principles to create classes of individuals or businesses who are above or outside the law.

JUDICIAL IMMUNITY IS A PRIVILEGE NOT GRANTED BY THE U.S. CONSTITUTION. IN FACT, IT IS POINTEDLY LEFT OUT OF THE CONSTITUTION AND IS IN OBVIOUS AND DIRECT VIOLATION OF THE RIGHTS GRANTED TO EVERY CITIZEN BY THE FIFTH, SEVENTH, AND FOURTEENTH AMENDMENTS.

"Those who have power," Montesquieu warned, "will tend to abuse it."

So widespread was this suspicion of uncontrolled power that the framers of the Constitution never even considered giving immunity either to Presidents or judges. During the Constitutional Convention, Madison timidly rose and asked about immunity for the President. His question was met with stony silence, and he sat down. The subject was never broached again, and the final Constitution makes no mention at all of executive immunity. Since the Constitution does give immunity to members of Congress, this omission cannot be ascribed to oversight."

As for judicial immunity, it was not even brought up at all. Not even the judges present at the Convention dared stand up, and ask about immunity for them selves. Again, the final document made no mention at all of immunity for judges. This omission, like that for the executive, likewise "cannot be ascribed to oversight."

James Wilson, a delegate at the Constitutional Convention, told skeptical members of the Pennsylvania ratifying convention emphatically:

> What peculiar rights have been reserved to <u>any</u> class of men, on any occasion? Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person throughout the United States? Is there a single distinction attached to him, in this system, more than there is to the lowest officer of the republic?... Far, far other is the genius of this system (Elliot 523).

In the Federalist #77 Alexander Hamilton, another delegate, agreed that even the President is liable for "forfeiture of life and estates by subsequent prosecution in the course of common law."

In the same vein, Charles Pinckney, a delegate from South Carolina declared:

> The convention well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more" (Annals of the 6th Congress, p 74).

The debate in Virginia was spirited. Patrick Henry and George Mason led a powerful bloc of Anti-Federalists who opposed the Constitution because it contained no Bill of Rights to protect the people against arbitrary abuse of rights. Against their eloquence, no one dared raise a voice to ask for immunity for judicial abuses. Judge Edmund Pendleton was a delegate, but he remained silent. Nor did any other judge stand up to ask about immunity for himself and his colleagues. If any of them had, the Constitution might very well have been defeated.

When the people of the United States wrote and ratified the Constitution, they also made unmistakably clear that the right of jury trial was not to be tampered with.

> Trial by jury...is secured by Magna Carta and the (English) bill of rights... It is generally thought by Englishmen that it is so sacred that no act of parliament can affect it (Grayson to Virginia ratifying convention, Elliot (supra), 72).

"The trial by jury is held as sacred in England as in America," Madison agreed in Federalist #78.

As a result of such powerful feelings, as soon as the Constitution was ratified, the Federalists kept their promise to pass a Bill of Rights, including the Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.

It does not add, "unless the defendant is a judge."

Sixteen years later Marshall reiterated this principle in Marbury v Madison (Supra):

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury (emphasis added).

In 1868 Congress passed, and the states ratified, the Fourteenth Amendment, calling for

equal protection of the laws.

It does not add, "unless one party to a dispute is a judge."

The principle of equal rights for all citizens, special privileges for none, is also enshrined in the Virginia Constitution's Bill of Rights.

In an explanatory note, the constitution refers to a 1933 ruling of the Virginia supreme court, Bryce v Gillespie (160 Va 137):

> An act is not invalid if within the sphere of its operation, all persons subject to it are treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

The Virginia Bill of Rights goes on to add:

> 4. No exclusive emoluments or privileges. No man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community...neither ought the offices of magistrate, legislator, or judge to be hereditary.

By including "judge" specifically in the same article, the authors made clear that judges are clearly and specifically included.

The US government has signed and the Senate has ratified, the United Nations Declaration of Human Rights. It is now a part of international law and, under the Constitution, a matter of US law. It says, in part:

> Article 1. All human beings are born free and equal in dignity and rights....
>
> Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind....
>
> Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law.
>
> Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law....

JUDICIAL IMMUNITY IS A PRIVILEGE GRANTED BY JUDGES THEMSELVES TO THEMSELVES IN VIOLATION OF BOTH THE CONSTITUTION AND THE STATUTORY LAW. THE UNITED STATES IS THE ONLY COUNTRY IN THE DEMOCRATIC WORLD IN WHICH JUDGES GIVE THEMSELVES THIS PRIVILEGE.

The United States is the only western democratic nation in which this is true. Britain, France, West Germany, Canada, Norway, Switzerland, and Finland, for example, give no absolute immunity to their judges. Only the Netherlands and Israel, that I have been able to find, do. And in both these latter countries immunity is conferred by the constitution, not by arbitrary action of the judges themselves.

The U.S. doctrine is a recent one, not promulgated until 1868, 81 years after the Constitution, which withholds immunity from the judiciary. The new doctrine was enunciated by the Supreme Court (Randall v Brigham, 74 US 523,) two years after Congress passed the Civil Rights Act calling for criminal penalties for judges, and the very same year that the 14th Amendment passed Congress providing for equal protection of the law.

Three years later, 1871 — one year after the 1870 Civil Rights Act gave all citizens the right to sue and guaranteed similar penalties for all, and the same year tht the Civil Rights Act of 1871 (the Ku Klux Klan Act) was being passed by Congress — the Court extended its own immunity to include even malicious or corrupt acts (Bradley v Fisher, 80 US 335).

Judidical immunity, expressly forbidden by "we the people" who wrote the Constitution, was summarily given by judges to every judge and justice of the peace in America, a small army of people, now num-

bering about 28,000, who say they are not required to obey the 5th, 7th, or 14th Amendments, or the Civil Rights Law.

The opinions in both Randall and Bradley were written by Justice Field. Unable to quote either the Constitution or the laws, he was forced instead to rest his case on a foreign law — a curious, quaint, and — to Americans — odious law: The English common law doctrine of the Divine Right of Kings.

As history, Fields was "simply incorrect," write Jay Feinman and Roy Cohen ("Suing Judges" 31 SC Law Rev 201, 1979). Actually, they write:

> A careful analysis of English Law shows that the basic rule was one of liability, that no simple rule of immunity ever existed.... In earliest English law, not only was immunity of judges not recognized, but review of judicial decisions was in the form of personal action against the judge. The consequences of a false judgment, a malicious judgment, or an action outside the judge's authority were severe for the judges (pp 205-6).

F Pollock and F Maitland in The History of English Law, 2d edition, 1898 (pp 664-668) agree that Britain originally allowed civil suits

against judges in the form of a complaint of "false judgment." Indeed, suits against the judge were originally the only form of appeal.

In 1607 a judge moved to change that 180 degrees. A Judge Barker, who presided at a murder trial and sentenced the defendent to death, was later charged with conspiracy for his action (77 Eng Rep 1305, Star Chamber). The jurist, Sir Edward Coke, said he could not be. Coke explained that judges are appointed by the king and act in place of the king, the king is divine and can do no wrong, thus "royal judges are only to make an account to God and King" (Barker's Case, 77 Eng Rep 1305, Star Chamber, 1607).

Since the Barker decision was a matter of common law, it could be over-ridden by Parliament. In 1751 — 25 years before the American Declaration of Independence — Parliament did strike down the ludicrous ruling in Barker. In the Justices Protection Act is said the people must be protected "from all willful and aggressive

abuse of the several laws." Damages were specifically authorized for acts done "maliciously and without reasonable and probable cause." (Feinman supra, 220).

In 1848 Parliament again affirmed the principle of judicial liability. In the Justices Protection Act of that year, it provided that suits alleging malicious acts by a judge could be tried (Id).

Today every judge in Britain is liable for his malicious acts. As recently as 1975 Britain's high court repeated that judges have no absolute immunity (Sirros v Moore, 1 QB 118, 1975).

The first state to break with this American--and English--tradition was North Carolina. Its supreme court conferred absolute immunity on itself and its fellow juges in 1803. New York followed in 1810. By the time of Randall in 1868, there were 37 states in the Union. In only 12 (Alabama, Arkansas, California, Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Virginia, and

Wisconsin) had the courts conferred absolute immunity privileges on themselves. In six (Illinois, Indiana, Iowa, Kentucky, Maryland, and South Carolina) courts had given a qualified immunity to themselves. In the other 19 — over half —Florida, Georgia, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, and West Virginia —judges obeyed the laws the same as everyone else (Yale Law Journal, supra). Donald K Barth says the Connecticut ruling was inconclusive ("Time for a Qualified Immunity?" 27 Case Western L Rev 742, 1971).

Two-thirds of the states —26 out of 37 — did not recognize absolute immunity. In none of the 18 states with immunity was it conferred by the state constitutions or by the state legislatures. In fact, Virginia had expressly legislated a statute making judges liable personally for the willfully erroneous appointment of guardians. The

Virginia courts simply threw that law aside.

Yet, in spite of the historical records, Justice Field made the amazing statement in Bradley that

> The principle (of judicial immunity) obtains in all countries where there is any well ordered system of jurisprudence. It has been the doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. (Bradley v Fisher, supra, 347)

Justice Field's statement was untrue on all all three counts.

It took the Supreme Court 80 years to abrogate the Seventh Amendment to the Constitution in Randall. It took it almost 100 years more to abrogate the Civil Rights Act, in Pierson v Ray, supra. Having declared that it would not obey the Constitution, it then declared that it would not obey Congress either. It decided that the words "Every person who subjects any citizen, ...shall be liable in an action at law" applied to every other citizen, but not to them.

The Court's logic was curious. It said that, since the law did not specifically include judges, it obviously did not intend to include them. By the same logic, since it did not include writers or electricians or economists, it apparently does apply to those groups either.

The Constitution not only withholds immunity from judges, it withholds the power of any citizen to grant himself immunity. It was never intended that any person should be allowed to decide for himself whether he is required to obey the Constitution and the laws or not. Naturally, any person with such power will decide that he need not—but that everyone else must.

A judge with a personal interest in a case will (or at least should) excuse himself. Every judge has a strong personal stake in cases involving his own immunity from the law. The conflict of interest is glaring.

Prosecutorial Immunity

In 1927 the Supreme Court extended immunity to federal prosecutors. In Yaselli v Goff (275 US 503) it ruled that a prosecutor accused of "willfully, maliciously, and corruptly" introducing "a great mass of false, misleading, and hearsay testimony and evidence" was immune from damages.

In 1976, in Imbler v Pachtman (424 US 409) this immunity was extended to state prosecutors. The case involved a prosecutor accused of knowingly using false testimony and suppressing material evidence in order to get a murder conviction. The Court ruled that immunity is necessary

> ...to protect the vigorous and fearless performance of the prosecutor's duty, which is essential to the proper functioning of justice(!)

Thus the Court completed the curious situation in which the only persons in the court room who say they are not bound to obey the laws and the Constitution are the judge and the prosecutor!

Self-Given Judicial Immunity is Unique to the United States.

The United States is the only country in the world, whose judges have given themselves the privilege to break the law.

Only two other countries among the western democracies, that I know of, give immunity to judges—the Netherlands and Israel—and both of those grant the immunity constitutionally. All the other great democracies, except the United States, permit their judges at most a qualified immunity for good faith. In Britain, France, West Germany, Canada, Switzerland etc, judges are required to obey the laws they administer.

As we have seen, Britain repudiated Divine Right of Kings, and judicial immunity 25 years before the American Revolution. Canada and the other nations of the Commonwealth have followed Britain's lead.

In France, judges of all but the highest civil court may be liable either under the Penal (criminal) Code or under the Code of Civil Procedures. Civil suits may be brought for

"fraud, intentional wrongful conduct or gross professional negligence" (Barth, (supra), 727, 750).

In Norway, by act of Parliament, judges may be sued but may plead good faith as defense (Storrvik Oystein, University of Oslo, letter to John B Holway dated June 9 1983).

In Switzerland also judges may be sued, although in some cantons it is necessary to get permission from the cantonal parliament first. (Letter dated April 18, 1983 from Dr. Jurg Leutert, legal advisor of the Swiss Embassy, to Holway)

Under Finland's Constitution Act, section 93, judges have no judicial immunity and may be sued for damages or on criminal charges, or both. (Letter from Dr Irma Lager, University of Helskini Faculty of Law to Holway)

West Germany holds its state officials, including judges, liable for wrongdoing. The doctrine derives from German common law, and was codified in the constitution of 1896, section 839.

(See also the Prussian Procedural Code and the Saxony Civil Code.) The present constitution of West Germany, Article 34, provides for suits for wrongs of "willful intent or gross negligence." (Barth, supra, 746-9)

Otakar Pritsch, Vice Consul of the German embassy in Washington writes:

> The Basic Law guarantees the independence of the judges. Article 97, para. 1 says: "The judge shall be independent and subject only to the law." This means that the judge is independent of the executive and legislative organs...Only when the judge is subject to the law can he be independent with out his independence being transformed into despotism. (Letter to Holway dated November 18, 1982)

Meanwhile, U.S. Judges Were Denying Immunity to the Executive

Just 14 years after first giving immunity to itself, the Supreme Court issued its most eloquent and ringing declaration in denying immunity to the executive branch. In 1882, in US v Lee (106 US 196) it struck down the immunity defense for an unconstitutional act by US agents and said, "No person shall be deprived of life, liberty, or property without due process of law." It added:

> No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it.

In Ex Parte Young, (209 US 123, 1879), the Court declared:

> The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority...and is an illegal act, and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct.

In 1971, in Bivens v Six Unknown Narcotic Agents (403 US 388), the Court ruled that federal agents who violate the Constitution may be sued for damages.

Three years later the Supreme Court stripped Governor James Rhoades of Ohio of absolute immunity in a suit arising out of the Kent State shootings (Scheuer v Rhodes, 416 US 232, 1974).

Writing for the Court, Chief Justice Warren Burger conceded that governors must often act in an atmosphere of confusion and swiftly moving events.

Thus, Burger wrote, a governor's discretion

must be broad. But even so, he went on, a governor is subject personally when he comes into conflict with the superior authority of the Constitution

In 1975 the Supreme Court ruled that a prison administrator is not entitled to absolute immunity, if he violates a clear constitutional right.

That same year the Court ruled that a school official also may not claim absolute immunity if he knew, or should have known, that he was violating a constitutional right (Wood v Strickland, 420 US 308, 1974).

In 1978 the Supreme Court ruled that qualified immunity applies to Cabinet officers as well. In Butz v Economou (438 US 478), Secretary of Agriculture Earl Butz asked for absolute immunity, even if he infringed a constitutional right. Commented the Court tersely: "We are quite sure this is unsound and consequently reject it."

It added:

> Executive officials may not with impunity act in a way that is known to them to violate the Constitution or transgress a clearly established constitutional rule, or go manifestly beyond the line of duty or stray beyond the plain limits of statutory authority.

And it repeated its rulings in Scheuer and Wood, that there is no immunity for officials who act with malice or who knew, or reasonably should have known, they were violating the Constitution. The courts

> do not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution....
>
> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law....
>
> This Court has never purported to grant immunity of any kind of any official who has manifesting overreached his authority or wrongfully exceeded clear constitutional or statutory authority....

In 1979 another Cabinet officer, Secretary of State Henry Kissinger, asked for immunity in a suite involving an illegal wiretap. (Halperin v Kissinger, 606 F 2d 1192) Again the court said qualified (not absolute) immunity for constitutional violations "is mandated by the tradition of equal justice under law.... Absent exigent circumstances, there can be no appeal to powers beyond those enumerated in the Constitution."

> The President, like all citizens, must be held to know the relevant law. Like every other citizen charged with knowledge of the law, he must be held accountable for personal misconduct.

The Result of Immunity: Evil Judges

Judges are supposed to be the guardians of the rights of the people. But who guards the guardians?

Two cases in Virginia, Johnson v Moorman (80 Va 131, 1885) and Berry v Smith (148 Va 424, 1927) involved false arrest of innocent citizens.

Gregoire v Biddle (177 F.2d 579, 1949) involved a man imprisoned for 18 months as an alien, when in fact he was a US citizen.

Grundstrom v Darnell (531 F.2d 272, 1976) involved a judge charged with denying a defendant the right to bail.

Alzua v Johnson concerned a Filipino store keeper who lost two stores—his lifetime investment — through illegal action of a judge.

In Bradley v Fisher, supra, an attorney was disbarred without a hearing.

Stump v Sparkman (supra) was the case of a judge who ordered a girl sterilized without permitting her a hearing or a lawyer.

In Jacobson v Schaeffer (442 F.2d 1274, 1974), a judge ordered a citizen locked up because he couldn't afford a court-appointed lawyer.

Ryan v Scoggin concerned a judge who ordered a 15-year-old girl to a mental hospital because she ran away from her mother to live with her father pending a custody suit.

In Francis v Crafts (203 F.2d 809, 1953) a judge transferred a feeble-minded boy from a state school to prison for 11 years without a hearing.

In McAlester v Brown Supra a deaf elderly man who came to court to give his son clean clothes for his trial, misunderstood the judge's order to get out; when he didn't move fast enough, the judge, screaming loudly, had him locked up.

O'Bryan v Chandler (352 F.2d 987) involved malicious prosecution, false imprisonment, slander, and libel. (See also Ravenscroft v Casey

(139 F.2d 776, 1944; Stahl v Currey, 135 Ohio St 253, 1939; Garfield v Palmieri, 297 F.2d 526, 1962.)

In Huendling v Jensen (168 NW 2d 745, 1969) an Iowa judge used the criminal process to further his own collection business. Even the appellate court said immunity "seems unfair", though it applied it anyway of course.

In 1980 an Illinois judge arrested a tenant in his apartment house at gunpoint at midnight, locked him up, had a friend sign a blank complaint form, charged the man with petty theft, forged his signature on a guilty plea and waiver of jury trial, arraigned him, convicted him, and sentenced him to eight months in jail, while the man was locked in a cell. (Lopez v Vanderwater, 620 F.2d 1229, 1980).

Another judge thought the coffee in the court house vending machine tasted bad. He ordered the vendor hauled before him in handcuffs. (Zarcone v Perry, 572 F.2d 52, 1978)

In 416 F.2d 929, 1969, a prosecutor, O'Connor, in the absence of his key prosecution witness, demanded that the defendant, Berg, answer self-incriminating questions. Berg refused. The The judge thereupon held him in contempt.

Judge Chagrin of Santa Clara California superior court told a 13-year-old Mexican-American boy:

> You are lower than an animal. Mexican people, after 13 years of age, it's perfectly all right to go out and act like an animal... I don't have much hope for you. You will probably end up in State's prison before you are 25, and that's where you belong, anyhow... You are no particular good to anybody. We ought to send you out of the country, send you back to Mexico. You belong in prison for the rest of your life for doing things of this kind. You ought to commit suicide. That's what I think of people of this kind. You are lower than animals and haven't the right to live in organized society. Just miserable, lousy, rotten people... You expect the County to take care of you. Maybe Hitler was right. The animals in our society probably ought to be destroyed because they have no right to live among human beings.
>
> Public Defender: Your Honor, I don't think I can sit here and listen to that sort of thing.

> Court: You are going to have to listen to it because I consider this a very vulgar, rotten human being... What are we going to do with the mad dogs of our society? Either we have to kill them or send them to an institution or place them out of the hands of good people... You have to make up your mind whether you are going to observe the law or not. If you can't observe the law, then you have to be put away." (Kates, supra, 626)

Writes Marianne Schwartz O"Bara:

> Maintaining immunity for a judge's illegal conduct is unpalatable to say the least... (It) unquestionably constitutes a self-serving attempt to maintain an 'imperial judiciary' (47 UMKC L Rev 81, 1981).

Not all judges of course are evil. But the point is that it is completely voluntary. They may be honest if they wish. But they can also be wicked, and their fellow judges strenuously uphold their privilege to be either.

THE UNITED STATES CONSTITUTION IS THE SUPREME LAW OF THE LAND. EVERY RIGHT EXPRESSLY STATED IN, AND GUARANTEED BY, THE CONSTITUTION TAKES PRECEDENCE OVER ANY EXTRA CONSTITUTIONAL PRIVILEGE IN CONFLICT WITH IT. THE CONSTITUTION ALSO TAKES PRECEDENCE OVER ALL FOREIGN CONSTITUTIONS, LAWS, OR DOCTRINES. IT SPECIFICALLY WIPES OUT THE MEDIEVAL ENGLISH DOCTRINE OF THE DIVINE RIGHT OF KINGS AND ANY PRIVILEGE RELATED TO IT.

As far as I know, this is the only instance in which the Supreme Court has placed another law — English common law, the Napoleonic code, Canon law, Talmudic law, the Code of Hammurabi, etc — above the US Constitution.

When "we the peole" wrote the Constitution, we declared it "the supreme law of the land, and the judges in every state shall be bound thereby." (US Constitution, Article VI, section two, emphasis added).

When the king's high-handed abuses against the American colonies finally led to Revolution, Americans laid down their complaints in the Declaration of Independence, three-quarters of which is a ringing list of grievances against the king's arbitrary acts under the doctrine of Divine Rights. (Indeed, the English themselves repudiated the doctrine and its corollary, judicial immunity.)

In the Virginia ratifying convention, when one delegate objected that common law was not established by the new Constitution, Edmund Randolph replied:

> The wisdom of the Convention is displayed by its omission, because the common law ought not to be immutably fixed...
> It is established only through an act of the legislature, and can therefore be changed as circumstances may require it. (Elliot, supra).

In 1932 the Supreme Court restated this doctrine when the governor of Texas seized oil fields by military force. In Sterling v Constantin (287 US 378) Chief Justice Charles Evans Hughes wrote for the majority that "there is no escape from the paramount authority of the federal Constitution" and that proceedings can be brought against the individual charged with the transgression.

Rationalizations Replace Constitutional Law

The argument against judicial immunity rests simply and firmly on the United States Constitution. The argument does not rest upon rationales as to whether or not the Constitution should have granted immunity to judges. The stubborn and irrefutable fact is that it does not.

First Rationale: Immunity Insures Independent Decisions

A federal judge summed up the judges' argument in McAlester v Brown (supra): Even though there may be an occasional diabolical or venal judicial act, the independence of the judiciary must not be sacrificed one microscopic portion of a millimeter, lest the fears of section 1983 intrusion (.e. a civil rights suit) cow the judge from his duty.

Comments Professor Rosenberg tersely: This is "a rather unflattering estimate by judges of the courage and moral fiber of their colleagues"

In Butz (supra) the Supreme Court ruled:

> It is not unfair to hold liable the official who knows, or should know, he is acting outside the law. Insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment (emphasis added).

This echoed the Court's opinion in Robertson v Wegmann (436 US 584, 1978) that "the denial of absolute immunity is intended to affect behavior that threatens to violate constitutional rights" (emphasis added). (See also Carlson v Green, 466 US 14, 1980).

If fearless, independent decision-making is considered desirable, then why, one may ask, is it not conferred on governors and cabinet officers?[as]

Actually, the principle of deterring judges is well established, in theory at least.

First, they must run for election and re-election, a process which Feinman and Cohen call "the basest of influences."

In addition, judges are liable, in theory at least, to discipline by state Judicial Inquiry and Review Commissions, subject to impeachment by the legislatures, and liable to criminal prosecution.

The Judicial Inquiry and Review Commission is empowered to remove a judge from the bench and take away all future pensions. Assuming an eight-year term at an annual salary of $75,000, such action could cost a judge $600,000 in salary. Assuming a pension of 50% of full salary for, say, ten years, that is another $300,000 out of his pocket, for a total of almost one million dollars. Impeachment could bring the same financial

penalty. And criminal prosecution could mean a similar loss, plus a prison sentence. Certainly these steps against a judge guilty of illegal conduct are intended to deter such conduct much more than the present suit.

Of course, in truth, these three deterrents do not deter. If they did, the illegal conduct would not have taken place.

The executive branch does not provide a check on his lawless behavior.

The legislative branch cannot prevent his constitutional abuses.

And even if one or all of these means did punish and deter the judge, none of them would recompense the victim for the injury done him.

A suit for damages, and only a suit for damages, will both deter illegal and unconstitutional judicial behavior and redress the wrong.

British Chief Justice Cockburn, an authority on English common law, scoffed at the rationale that judges must be free and undeterred by the very laws they administer:

> I cannot believe that judges...would fail to discharge their duty faithfully and fearlessly according to their oaths and consciences...from any fear of exposing themselves to actions at law. I am persuaded that the number of such actions would be infinitely small and would easily be disposed of. On the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice as that the authors of such wrong ought to be responsible to the parties wronged.

Second Rationale: Appeal Makes Damage Suit Unnecessary

This argument presents the spectacle of a judge, afraid to submit himself to the judicial process, insisting that a non-judge submit himself to more judges' justice through appeal.

If trial judges break the laws and violate the Constitution, what assurance does the citizen have that appeals judges are any better?

An appeal is costly and time-consuming. And it does not deter the judge from turning around and doing the exact same thing to the next citizen who walks into his court.

The Third Rationale: The Injustice of Trying an Innocent Judge

Judge Learned Hand framed the question in 1949 in Gregoire v Biddle (supra), when he said An official who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause.... There must be some means of punishing public officers who have been truant to their duties. If, Hand said, "it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery." But he refused to subject innocent judges to the necessity of proving their innocence.

This is an amazing admission by a famous jurist of his lack of faith in the American court system. If the judges themselves do not believe they can receive justice in their own courts, how can a non-judge trust himself to the "mercies" of the same courts?

Why do Thornton, Smith, and Bryan fear a trial by jury in their own courtrooms? Are they afraid they will not get justice there? Or are they afraid that they will?

And why are innocent judges the only innocent citizens to be spared the need to prove their innocence? Why not innocent bank officers, innocent auto mechanics, innocent landlords, innocent school teachers etc?

The Supreme Court dismissed Hand's argument in 1980, when it ruled:

> The expense and disruption of defending itself, even if substantial, does not constitute irreparable damage.... The expense and annoyance of litigation is 'part of the social burden of living under government' (FTC v Standard Oil of California, 449 US at 244, 1980).

The irony of the entire rationale was summed up in 1868 by the Supreme Court when it first gave immunity to judges in Randall v Brigham, (supra):

> Immunity is meant to protect judges when they have erred. If they have decided rightly, they need no protection.

Fourth Rationale: Deterring Good Men from Becoming Judges

The federal court in Doe v County of Lake, (399 F.Supp 553, 1973) dismissed this argument neatly when it said:

> Nor should any person be deterred from public service because of the possibility that a court may order him to conform his future conduct to the law.

It is absurd to argue that qualified people will not run for President, or governor, or seek Cabinet offices, or become judges, unless they are given permission in advance to violate the Constitution and break the laws. There is no evidence that qualified men have been dissuaded from running for high political office since the Supreme Court took away absolute immunity from cabinet officers and governors. There is no reason to think it would have an effect on good and honest men who are attracted to a judicial career.

However, it should deter incompetent and dishon-est men from becoming judges.

Fifth Rationale: Preventing Frivolous Suits

Frivolous suits will be "infinitely small," Chief Justice Cockburn said — "quite rare," the US federal court agreed in Halperin — and "can be quickly dismissed," the Supreme Court added in Butz.

Certainly most people would not bring suit even with real grievances. Suits and appeals are costly, time-consuming, and most people would shrug that they can't win against a judge anyway, with a battery of fellow judges all anxious to protect their colleagues and thus themselves.

Then too, no lawyer will take a case against a judge. It would destroy his career to do so.

Yet since absolute immunity was stripped from governors in Scheuer, there has not been an avalanche of suits against governors, frivolous or otherwi

Since absolute immunity was taken away from Cabinet officers in Butz, we have not seen a spate of harrassing suits against members of the Cabinet.

Sixth Rationale: Upholding Respect for Judges

Actually, immunity leads to contempt for the judicial profession, not respect.

Madison wrote that judicial power "cannot be abused without raising the indignation of all the people" (Elliot, supra, 535).

In more recent times, Justice Potter Stewart, speaking of "an aura of deism which surrounds the bench," wrote:

> If aura there be, it is hardly protected by exonerating from liability such lawless conduct as took place here. And if intimidation would serve to deter its recurrence, that would surely be in the public interest (Stump v Sparkman, supra).

As the Yale Law Journal (Supra) put it:

> Respect is hardly engendered by the knowledge that, by reason of a judge-made rule, a judicial officer may maliciously abuse his powers and leave the citizen without remedy.

Justice William Rehnquist put it this way:

> The ultimate irony is that in the area of common-law official immunity, a body of law fashioned and applied by judges, absolute immunity within the federal system is extended only to judges and prosecutors. The cynical among us might not unreasonably feel that this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as "lesser breeds without the law." (Butz, supra)

Seventh Rationale: Immunity Is for the Public's Good

Thornton and Smith raise this rationale in their Motion to Dismiss. But the Supreme Court rejected it in Butz (supra):

> The Court imposed a very stringent burden on federal officials who seek exception from the established rule of qualified liability. They must bear the burden of showing that public policy requires an exemption of that scope.

If the public good is really the rationale for judicial immunity, then why is not the same immunity granted to members of the President's Cabinet as is granted to two minor judges from a semi-rural county in Virginia?

No judge, as far as I know, has ever asked the public what is in its "good".

I am a representative of that public. And, speaking for the public, I can say that it is not in our good that judges are permitted unrestrained lawlessness.

If we the people desire to change our minds and give judges the right to break the law and violate the Constitution, we can amend our Constitution to permit it. We have not.

Summary

Over the entrance of the Supreme Court, in letters chiseled large and bold is written:

EQUAL JUSTICE UNDER LAW

If US judges are permitted to give themselves immunity to break the law, then the courts—and the laws themselves—are destroyed.

Richard Williams, in his opinion (below) in the present case, adds to this alarming doctrine a second, equally dangerous one. He writes that Holway's story is a "concoction," which "stretches his imagination." Now, instead of juries and rules of evidence, and adversary proceedings, and appeals, and all the other built-in safeguards to insure that facts are found as accurately as humanly possible, Williams has substituted "his imagination."

Williams made this amazing ruling without any evidence at all and in the face of the motions for dismissal by every defendant, admitting all the allegations.

Williams also misquotes defendant Tydings' letter to Holway, which Williams had in front of him. He quotes Tydings as writing that the conduct complained of is not misconduct "under the Disciplinary Rules" (App 11). The correct quote by Tydings is that the conduct is not misconduct "under the law."

Williams creates a Catch-22 argument when he says Holway has not proved his case and therefore will not be allowed an opportunity to present his evidence before a jury in court. That is what the present case is all about: The constitutional right to do exactly that, an outcome which every judge and lawyer who has touched the case has so far refused to permit.

A citizen who sues a judge feels like the Washington Redskins arriving in Dallas for the big game against the Cowboys to find the referees, the umpires, the linesmen, even the chief of umpires of the league, all wearing Cowboy uniforms. (He even finds, in the present case, that appeals must

be taken to the father of Cowboy coach Tom Landry.) The citizen is all too aware that he is playing ball in the judges' court, with the judges' ball, the judges' rules, and the judges' umpires.

Such a manifestly unfair situation would not be tolerated in the National Football league. Any judge watching such a game on TV would cry protest.

Suppose that the eight defendant judges and lawyers are eventually found liable for damages as a result of phony citations which they are not allowed to see, and without being allowed to offer evidence, to submit their case to a jury, or even to defend themselves at all. They would be the second ones to complain that their rights had been violated. I would be the first one. I would demand that they receive the rights which are their due under our Constitution and laws.

It is precisely because they do not grant me the same rights which they demand for themselves, that they are on trial.

> There was a time when judges were kings in their courts. But monarchs in a democratic society are an anachronism, no matter how small their kingdoms or how rarely their subjects suffer abuse.... It is time to put an end to even the possibility of judicial tyranny. A doctrine that immunizes malicious and negligent conduct can no longer be justified (Wray, Frank, "Must Judges Be Kings in Their Courts?", 64 Judicature 399, 1981).

I asked in Williams' court: "Will this court add its name to the long list of judges and lawyers who have defended the privilege of judges and lawyers to commit fraud?

It will be a sad day for America if the answer is yes.

I call on this Court to repeat its resounding words in US v Lee: "No man is above the law. All men are creatures of the law and bound to obey it."

CONCLUSION

For these reasons a Writ of Certioriari should issue to review the judgment and opinions of the Eastern District of Virginia.

Respectfully submitted,

John B Holway

Pro Se

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JOHN B. HOLWAY,)

Plaintiff,)

)

v.

WILLIAM HAMBLEN, et al.,)

Defendants.)

ORDER

This matter came before the court on October 1, 1982, on four oral motions to dismiss under Fed. R. Civ. P. 12(b)(6) and two written motions to dismiss, each made by the various defendants to this action. In addition, plaintiff made a motion to disqualify all Eastern district of Virginia judges from hearing this case. Plaintiff's motion to disqualify is DENIED for the reasons stated

from the bench. Based upon oral argument and upon consideration of plaintiff's Complaint and Reply to Motions to Dismiss, each of the defendants' motions are hereby GRANTED for the reasons set forth in the accompanying memorandum opinion. Consequently, this case is dismissed.

Let the Clerk sent a copy of this order to all counsel for record.

Date:_____ _____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JOHN B. HOLWAY,)

Plaintiff,)

)

v.) Civil Action No.

) 82-0763-A

WILLIAM HAMBLEN, ET AL.,)

Defendants.)

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Plaintiff has initiated a 42 U.S.C.§ 1983 and §1985 case against these defendants for injuries allegedly suffered as the result of a growing "conspiracy" amongst the Bar and members of the judiciary.

Holway was the owner of Cardinal Productions, Inc., a corporation operating under the name of

Featherstone Theater. (Complaint ¶7). Holway subsequently sold the corporation to John Robert Tucker. Tucker gave Holway a security interest in the chattels, including all equipment in the Featherstone Theater. (Complaing ¶8). When Tucker defaulted on a note, Holway instituted a legal action and sought the right to remove the equipment. (Complaint ¶9). Jonathan England became involved because he was the landlord of Featherstone Square Shopping Center. A conveyance of the equipment was made by Tucker to England, and Holway claimed that this transfer was fraudulent. Defendant Percy Thornton, of the Circuit Court of Prince William County, was named in the present suit because in 1977 he presided over the case between Holway and England. Defendants Friedlander and Shoemaker represented England in that suit. (Complaint ¶¶ 15,16,17). Holway alleges that these two lawyers misinterpreted and "deliberate(ly) and fraudulently (told) untrue statement(s)" in that proceeding. Such statements stem from the attorneys' representations in court

with regard to the meaning of a case and the nature of Virginia law. Holway tried to obtain satisfaction for what he determined to be an injustice by requesting that a criminal prosecution be initiated against these two attorneys.

Defendants William Hamblen, Helen Fahey and Ronald Tydings allegedly joined the "conspiracy" at this point. Hamblen and Fahey, of the comonwealth Attorney's office, refused to prosecute as the conduct complained of was not criminal in nature and Tydings, a committee member of the Virginia State Bar, was joined as he refused to investigate any further or take any disciplinary actions.

Judge Selwyn Smith, of the Circuit Court of Prince William County, heard the next case brought by Holway in which he tried to recover a rug. Holway subsequently requested that Judge Smith take action against Friedlander and Shoemaker for their "illegal, corrupt, dishonest, unworthy, and unprofessional conduct." (Complaint

¶ 40). Smith refused to do so and Holway consequently filed a suit in U.S. District Court. He appeared before Judge Albert V. Bryan, Jr. Judge Bryan apparently refused to let in evidence of the alleged "deception" by Friedlander, Shoemaker, and Thornton and ruled in favor of England. (Complaint ¶56). Holway alleges in his complaint that this action by Judge Bryan was part of the "conspiracy" and that he sincerely doubted that any judge was going to give him a fair trial.

The Honorable Albert. V. Bryan, Jr. has moved this court for dismissal under Fed. R. Civ. P. 12(b)(6) on the grounds that he is absolutely immune from liability under the cause of action alleged in the complaint. This court agrees. The actions taken by Judge Bryan are clearly within his official capacity. The plaintiff complains that Judge Bryan refused to let him introduce certain evidence and then "summarily dismissed the jury and ruled in favor of [one of the defendants in that lawsuit]." Under the test announced in

Stump v. Sparkman, 435 U. S. 349 (1978), a judge is absoulutely immune from liability in actions seeking monetary damages. The Supreme Court noted with regard to immunity: "The governing principle of law is well established... As early as 1872, the Court recognized that it was 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested him, [should] be free to act upon his own conviction...' Bradley v. Fisher, 13 Wall 335, 347 (1872)... Later we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle. Pierson v. Ray, 386 U.S. 547 (1967)." Stump, id. at 355-356. The test to be applied is as follows: "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather

he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" Stump, id. at 356-357. It is clear that Judge Bryan's actions were within his judicial capacity and he did not act in the clear absence of all jurisdiction. Absolute immunity is therefore granted.

Similar analysis is necessary and dispositive with regards to Judge Thornton and Judge Smith. as taken from the complaint, Judge Thornton heard the original case and ruled in favor of England. Holway is attacking Judge Thornton's ruling as "fraudulent". Plaintiff bases his allegation upon his reading and understanding of a case used as authority in the suit. The complaint alleges only misconduct of the Judge sitting in his capacity as a Circuit Court Judge. Likewise, Judge Smith was added to the list of "conspirators" for his ruling in a subsequent case in Circuit court and for statements made by the Judge from the bench. His actions fall within the absolute immu-

nity defense as they were undertaken in his official capacity. For these reasons and in light of Stump v. Sparkman, the case is dismissed with regards to Judges Thornton and Smith.

William Hamblen and Helen Fahey are both attorneys in the Commonwealth Attorney's office. According to the Supreme Court's opinion in Imbler v. Patchman, 424 U.S. 409 (1976), prosecuting attorneys are immune from liability in actions such as the one brought here. Although Imbler speaks to the prosecutor's immunity for prosecuting, this court will make the logical extension and apply it to cases in which the prosecutor has exercised his or her discretion and has refused to prosecute. For the public policy considerations espoused in Imbler, such an extension is necessary and proper for the functioning of the commonwealth Attorney's office. It is not alleged that Hamblin and Fahey engaged in conduct outside of their prosecutorial capacity and therefore the doctrine of prosecutorial immunity is applicable.

under 42 U.S.C. § 1983, § 1985 private citizens are given redress for the deprivation of rights. However, under neither the Constitution of the United states, nor the Amendments thereto, are citizens given the right to initiate or request initiation of criminal prosecutions. Such is left to the sole discretion of magistrates, prosecuting attorneys, and grand juries. There is no constitutionally guaranteed right to have such persons prosecute. Hence, there is no basis for a § 1983 or § 1985 suit. the 12(b)(6) motion is therefore granted as to Hamblen and Fahey.

Defendant Ronald Tydings also seeks dismissal under Fed. R. Civ. p.12(b)(6). It was Tydings who informed Holway that after a preliminary investigation of his complaint against Messrs. Friedlander and Shoemaker, the Committee was

dismissing the matter as the conduct questioned did not constitute "misconduct" under the Disciplinary Rules. In support of his motion to dismiss, Tydings offers two defenses. First, it is stated that Holway has no legal interest in a complaint filed with the Virginia State Bar, and second, Holway failed to meet the statute of limitations. As to the first point, Holway asserts that he has been deprived of property and of unspecified rights under § 1983 and §1985 (Complaint ¶¶ 67, 69). Tydings first defense would be dispositive if no property right is i fact at issue. This court holds that Holway does not have a property right in or legal interest in a complaint filed with the Virginia State Bar. Plaintiff was given a chance to file a Reply Brief, which he did, and based upon a careful reading of that brief and the Complaint, this court cannot discern any property right. As to the second defense, the statute of limitations does appear to bar the suit as brought against

Tydings. Although this court does not base its dismissal solely on the statute of limitations, it is dispositive in and of itself. A federal court is to apply the limitation period provided by the state law for a closely analogous action. In Virginia, §8.01-243(A) is applicable to civil rights actions such a s §§ 1983 and 1985. This section of the Code provides for a two-year limitation and since Tydings' alleged misconduct occurred in July of 1979, this action appears to be barred. See, Steward v. Norfolk, F. & D. Ry., 486 F. Supp. 744 (E.D. Va. 1980), aff'd, 661 F.2d 927 (4th Cir.); and Va. Code §8.01-243(A) (Supp 1982). This is not a continuing violation as Holway asserts. It is alleged in the complaint tha Tydings played a specific role in the "conspiracy:, and that his part in it ended when he refused to investigate further. For these reasons, Tydings' 12(b)(6) motion is granted as there is no cause of action upon which relief can be granted.

This brings us to Mr. Friedlander and Mr. Shoemaker. Plaintiff has sued defendants under the civil Rights Act and under 28 U.S.C. §§ 1331, 1343, and 1391. The case against Friedlander and Shoemaker is dismissed as the complaint does not adequately support the alleged jurisdictional base upon which Holway relies. To fall within §§ 1331, 1343, or 1391, the matter must arise under the Constitution, laws or treaties of the United States. Diversity jurisdiction is not pleaded in the complaint. For this suit to survive, it is necessary that Holway make a sufficient claim under 42 U.S.C. §§ 1983 or 1985. Based upon the facts as taken from the complaing and in light of recent Fourth Circuit and Supreme Court opinions, there is no claim upon which relief can be granted.

Under 423 U.S.C. §§ 1983, 1985, there are two threshold requirements that must be apparent from the complaint, in order for it to survive a motion of dismissal. The first requirement is that the

plaintiff have suffered a deprivation of right secured by the Constitution of other law of the United States. The Civil Rights Act was intended to vindicate only federal rights determined under federal substantive law, not to be a remedy for ordinary state torts. It is true, however, that where the violation of state law allegedly causes a constitutional deprivation, a cause of action is stated. Plaintiff is claiming a violation of the Due Process requirement of the Fourteenth Amendment. Assuming, arguendo, that plaintiff passes the first requirement of a §§ 1983, 1985 suit, he does not survive the second.

It is clear from the volume of cases and commentary written on the Civil Rights Act that it is a prerequisite that the defendant(s) have acted (1) under the "color of state law", and (2) that there be state action. Recently, the Fourth Circuit Court of Appeals decided a § 1983 case that is closely analogous to the case at bar. The issue to be resolved in Lugar v. Edmonson Oil Co, Inc., 639 F.2d 1958 (1981), was whether a

claimants' conduct, prejudgment attachment of plaintiff's property, constituted private action "under color of state law" within contemplation of 42 U.S.C. § 1983. In the initial action, the defendant company was sued for maliciously invoking the stateprejudgment attachment procedure which resulted in the seizure of Lugar's property by the facts shown. Lugar claimed that the seizure by levy deprived him of property without due process of law. "The district court held, relying essentially upon Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), that the complaint did not allege a deprivation of property by "state action", and accordingly dismissed that action for failure of the complaint to allege a claim conizabe under § 1983." Lugar, id. at 1061. Thus, it made a distinction between the "under color of" and state action requirements. I analyzing the case, the Fourth Circuit emphasized the following elements as most critical:

First, [the issue] deliberately focuses inquiry upon whether the specific conduct directly chargeable to the § 1983 defendants was taken under color of state law, rather that upon whether the ultimate deprivation of right charged can be attributed to state action. Next, it emphasizes that the conduct directly chargeable to the § 1983 defendants is narrowly that of invoking , as private litigants, state judicial proceedings for the adjudication of a private controversy, and includes no earlier or later involvement of the § 1983 defendants with the state officials other than as private litigants in those proceedings... It has become a commonplace that in the typical § 1983 case involving a claim of deprivation of a constitutionally secured right, the state action requirement necessitated by the Fourteenth Amendment's undergirding, and the under color of state law requirement necessitated by the statutory language ordinarily come to the

> same thing. Nevertheless there has been occasional recognition that this is not always so--that the two are separate, nonecessarily congruent, but culmative predicate elements of a prima facie § 1983 claim. Lugar, id. at 1062.

Next, the Court focused it analysis on three patterns into which, in its opinion, § 1983 litigation tends to fall. The first pattern is the "official act" case in which state action is apparent from the manner of the act. The second is when private actors alone are alleged to have engaged in conduct that has deprived a person of a secured right. In these situations no state official is involved, but the action is attributable to the state by virtue of decisions made or policies established. The third pattern involves the conduct of a private actor defendant who has allegedly combined actions with the acts of a state official at the enforcement or operational level. This pattern appears to be the one most closely

analogous to Holway's complaint. for this type of case the Fourth Circuit has determined that the two requirements of "under color of state law" and of state action must be considered as separate and distinct. The state action requirement is to be found by referring to the totality of the conduct leading to the injury, whereas the "under color of state law" requirement, concerned as it is with a special attribute of the specific conduct charged to a particular tortfeasor, is properly referred to the specific conduct. Lugar, id. at 1065 n.14. This court must therefore look at the specific conduct of Friedlander and Shoemaker as alleged in the complaint to determine if they acted "under color of state law". The Supreme Court in Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), stated that while a private person can be liable under § 1983, he must have acted "with the knowledge of and pursuant to" the state officials," or put alternatively, "a willful participant in joint activity with the state or its agents." Adickes,

id. at 161. In the complaint Holway asserts that the "fraudulent scheme" and "conspiracy" commenced when Friedlander undertook certain actions, in his capacity as England's attorney, to complete a coveyance to a third party. There is not state action or any pretense of action "under the color of state law" involved in these transactions. Judge Thornton, the next defendant to have had allegedly become a member of the "conspiracy" could possibly have provided the nexus necessary to fulfill the requirement of state action. This position, however, stretches the imagination. What simply and straightforwardly occurred was that Holway suffered and adverse ruling and has concocted a web of intrigue and conspiracy that he would have us believe reaches all levels of the judiciary and the bar. In the recent Supreme Court case of Dennis v. Sparks, 449 U.S. 24 (1980), the court dealt with a § 1983 suit in which there was an alleged conspiracy between a judge and a private individual. The court noted: "Of course, merely

resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. But here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge..." Dennis, id. at 28. [emphasis added]. The court held that dismissal was inappropriate where the sole argument made by the defendants was that because the judge had been awarded immunity, they likewise were immune. This is not the case here. The facts in Dennis show that the private persons had persuaded the judge to exercise his jurisdiction corruptly and to illegally issue an injunction against plaintiff's production of minerals. There is no allegation of or factual support for bribery of the judge in the case at bar and his rulings, unlike that in Dennis, has not been struck down as illegal.

The court in Lugar, supra stated with regards to the Dennis opinion:

In the setting we consider, 'joint engagement or participation of private actor with state official implies such a usurpation of corruption of official power by the former of surrender of power by the latter that the independence of the enforcing official has been comprised to a significant degree and the official powers have become in practical effect shared by the two. Judged by this test it is plain that merely invoking a state's judicial process and thereafter participating in it solely as private litigant does not constitute joint engagement or participation by the private litigant with the state officials who then independently conduct and enforce that process. The private initiating act, and the official enforcement acts are in no realistic sense joint but are instead discontinuous and independent. Lugar, supra at 1069. [emphasis added].

Plaintiff, in this case, fails to show anything other that the unpleasant imposition of an adverse ruling and the mere allegation of a "conspiracy" between the Judge and the lawyers is not enough to state a claim under 42 U.S.C. § 1983 or § 1985.

Let the clerk send a copy of this memorandum to all counsel.

DATE:_____ _____

UNITED STATES DISTRICT JUDGE

APPENDIX B

No. 82-2061

John B. Holway,

Appellant,

v.

Percy Thornton; Selwyn Smith; Albert Bryan; Mark P. Friedlander; Clifford Shoemaker; Ronald Tydings; William Hamblen and Helen Fahey,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge.

Submitted: January 31, 1983

Decided: March 22, 1983

Before SPROUSE and CHAPMAN, Circuit Judges; BUTZNER, Senior Circuit Judge.

(John B. Holway, Appellant Pro Se. Mark P. Friedlander, Jr., FRIEDLANDER, FRIEDLANDER & BROOKS, P.C., for Appellees Shoemaker and Friedlander; Dennis G. Merrill, Assistant United States Attorney, for Appellees Thornton, Smith and Tydings; Robert Ellis, Susan Greenlief, for Appellee Hamblen; Joanne F. Alper, for Appellee Fahey.)

PER CURIAM:

A review of the record and the district court's opinion discloses that this appeal from its order denying relief under 42 U.S.C. § 1983 is without merit. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court. Holway v. Thornton, C/A No. 82-0763 (E.D. Va., Oct.26 and Nov. 17, 1982).*

Affirmed

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* Holway has filed a motion to disqualify the entire court. Alternatively, he moves to dismiss Judge Albert V. Bryan, Jr., as a defendant. As Holway has shown no facts indicating that the court is biased or prejudiced that motion is denied. Curry v. Jensen, 523 F. 2d 387 (9th Cir. 1975). His motion to dismiss Judge Bryan as a defendant is granted.